

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

APPEAL NO. 342 of 2018

&

IA No.1663 of 2018 & IA No.243 of 2019

Dated: 12th August, 2021

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. Ravindra Kumar Verma, Technical Member**

In the matter of:

1. Hukkeri Solar Power Project LL.P,
Through its Designated Partner
Sri. Sidram Kaluti
BC 109, Davidson Road,
Camp: Belagavi. 590 001
Karnataka

2. Sri. Ishwar S.Matagar
Mallapur (G), Taluka: Gokak
Belagavi District- 591 309
Karnataka,
Camp: Belagavi. 590 001
Karnataka

.....Appellants

Versus

1. Hubli Electricity Supply Company Limited
Through its Managing Director,
P.B. Road, Navanagar,
Hubballii- 580 025

2. Karnataka Electricity Regulatory Commission
Through its Secretary
No.16, C-1, Millers Tank Bed Area,
Vasant Nagar,
Bengaluru- 560 052

.....Respondents

Counsel for the Appellant(s) : Mr. Basava Prabhu Patil, Sr.Adv.
Mr. Shubhranshu Padhi
Mr. Ashish Yadav for App.1 & 2

Counsel for the Respondent(s) : Mr. Shahbaaz Husain
Mr. Fahad Khan for R-1

J U D G M E N T

PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON

1. The Appeal No. 342 of 2018 has been filed by the Appellants under Section 111 of the Electricity Act questioning the legality, validity and correctness of the Impugned Order dated 30.08.2018 in Original Petition No.69/2017 passed by the Karnataka Electricity Regulatory Commission .

2. The said original petition was filed by the Appellants herein challenging the direction and communication issued by the Respondent Commission vide order dated 13/04/2017 and seeking extension of time for the commercial operation of the Solar Power project. The Commission under the impugned order has held that the Appellants are not entitled to

extension of time for commissioning of the solar power project in terms of Article 2.5 (Extension of Time) read with Article 8 (Force Majeure) of the Power Purchase Agreement dated 07.07.2015 read with Supplementary PPA dated 16.09.2016.

3. Questioning the aforesaid Impugned Order, Appellants have preferred the present appeal.

Brief Facts of the Case:-

4. The Appellant No.1, Hukkeri Solar Power Project LL.P(hereinafter referred to as '**Appellant No.1**') is a Limited Liability Partnership incorporated under Limited Liability Partnership Act, 2008 having its registered office at BC 109, Davidson Road, Camp, Belgaum, Karnataka- 590001, India. The Appellant No.1 was formed as a Special Purpose Vehicle (**SPV**) to undertake the Solar Power project, a Non-Conventional Power project at Hukkeri Village, Belgaum District, State of Karnataka.

5. The Appellant No.2 is the Solar Power Developer (**SPD**) in the present matter.

6. The Respondent No.1, Hubli Electricity Supply Company Limited(**BESCOM**), is a distribution company within the meaning of 2(17) of the Electricity Act, 2003 and a Government of Karnataka Company incorporated under the provisions of the Companies Act, 1956 with its registered office at K R Circle Bangalore, Karnataka – 560001.

7. Karnataka Electricity Regulatory Commission (Respondent Commission/ State Commission) is the Electricity Regulatory Commission for the State of Karnataka exercising jurisdiction and discharging functions in terms of the Electricity Act, 2003.

8. On 01.07.2011, the Government of Karnataka introduced the first solar policy for the state of Karnataka for the period 2011-2016 in order to harness the potential of solar resources in the state.

9. On 10.10.2013, the State Commission passed the generic tariff order determining the tariff at Rs. 8.40 for the solar power generators entering into PPA on or after 01.04.2013 and up to 31.03.2018, other than those where the tariff is discovered through the competitive bidding process.

10. On 22.05.2014, the Government of Karnataka introduced the second Solar Policy for the period 2014-2021. Under the said solar policy, the State Government envisaged the Scheme relating to Utility Scale Grid

Connected Solar photo voltaic (**PV**) and concentrated solar power projects. In this Scheme, the State Government endeavoured to promote solar energy projects preferably by land owning farmers with a minimum capacity of 1 MWp and maximum capacity of 3 MWp per land owning farmer in the state for sale of power to State Electricity (Distribution) Supply companies (hereinafter referred to as the '**ESCOMs**') at the tariff determined by the State Commission from time to time.

11. On 26.08.2014, the Government of Karnataka issued Government Order being GO: EN 62 VSC 2014 providing for the guidelines to be adopted by the ESCOMs and Karnataka Renewable Energy Development Limited (hereinafter referred to as '**KREDL**') for implementation of Clause 8, Segment 1, Category 1 of the Solar Policy 2014-21. The guidelines were issued to promote solar generation by land owning farmers (small solar power projects under land owners/farmers scheme 1-3 MW) throughout the State of Karnataka.

12. On 09.10.2014, the KREDL issued Notification inviting application from the interested parties for facilitating the development of renewable energy in the State of Karnataka. In response to the above, the Appellant No.2 submitted an application for participation in the Solar Power development. The application of the Appellant No.2 was evaluated and

the proposal to set up a Solar Power Project was approved and the Letter of Award (**LOA**) was issued in favour of the Appellant No.2.

13. In terms of the above, on 07.07.2015, the Appellant No.2 entered into a PPA with HESCOM which is the distribution licensee in the area where the 2 MW Solar Power Project was proposed to be set up, namely, at Hukkeri Village and Taluka, Belgaum in the State of Karnataka. The PPA executed between the parties was in terms of the standard form of the PPA for execution by the Solar Power Developer in the State, which is in terms of the above Policy of the Government of Karnataka and the Guidelines issued for the said purpose.

14. On 31.07.2015, the State Commission approved the PPA dated 07.07.2015 executed between the Appellant No.2 and HESCOM.

15. Pursuant to the application for issue of 11 E sketch filed by the Appellants, the Revenue Authorities conducted a survey on 06.11.2015. However, the 11 E sketch came to be issued only on 16.12.2015, after a delay of more than a month from the date of survey.

16. The Appellants state that the implementation of the 2 MW Solar Power Project, in terms of the PPA dated 07.07.2015 and also the

Guidelines issued by the Government of Karnataka, required various approvals, permissions, sanctions etc. from the Government of Karnataka, the other Government Agencies and also the HESCOM for connectivity of the Solar Power Project with the Grid for evacuation of power generated at the project. The Appellants were required to fund and finance the project by substantial debt being borrowed from the Banks and Financial Institutions. The financial closure of the project with the Banks and Financial Institutions was dependent upon the Appellants duly securing the approval from various agencies for implementation of the project. These include principally, the following:

- (a) Approval for conversion of the land from agricultural purpose to be used for setting up a Solar Power Project;
- (b) Connectivity of the Solar Power Project with the Grid and power evacuation approval on the 11 KV Power System up to 110/33/11 KV Hukkeri Substation;
- (c) Providing the Bay estimation for the connectivity at the Bay of the substation of the transmission/distribution system and to provide approval for the break-up and other equipment to be obtained by the Appellants;

(d) Grant of approval by the Chief Electrical Inspector for charging of the line and for safety and security issues connected with the generating station and line connectivity, installation of metering arrangement, synchronization etc.

17. With regard to the approval for conversion of the use of the land from agricultural purpose to the purpose of setting up a Solar Power Project, the Appellants obtained various documents/approval which are required for the Application for conversion and applied to the Deputy Commissioner, Belagavi on 30.05.2016 vide application dated 30.05.2016 duly acknowledged (which has been mentioned in the final Land Conversion Order dated 24.09.2016). The demand Notice for payment of the conversion charges (after the Tahsildar's recommendation to the Deputy Commissioner) was issued by the Deputy Commissioner on 06.09.2016 (i.e. after 3 months). Thereafter, the payment was made by the Appellants on 08.09.2016 within 2 days. The Order of Conversion of Land into Non-Agriculture was given by the Deputy Commissioner only on 24.09.2016. Thus, the approval for conversion of land was received after a lapse of about 4 months.

18. On 14.03.2016 the Appellant submitted the application for Grid connectivity and power evacuation approval through 11 KV Power System with connectivity to 33KV/11 KV Hukkeri Substation. Letter for payment of processing fees was received only on 06.04.2016 and the same was immediately complied with on 15.04.2016. The tentative approval was received only on 04.08.2016. The final approval for evacuation scheme was issued on 29.08.2016 by HESCOM (about 6 months after submission of the application for grid connectivity).

19. On 21.11.2016, the Appellant applied to the Chief Electrical Inspector with drawings pertaining to the electrical installation of the 2 MW Solar Power Project. This approval was given by the Chief Electrical Inspector only on 24.12.2016. After the payments of the inspection fees and thereafter the submission of the completion report on 20.02.2017, the plant safety approval for commissioning of the project was on 28.03.2017.

20. In the circumstances mentioned herein above, there were delays in the implementation of the project for reasons not attributable to the Appellants but attributable to the time taken by the Government Agencies for granting necessary approvals as mentioned herein above.

21. In the circumstances, the Appellants approached HESCOM for extension of time by writing the letter dated 03.12.2016 whereby the appellants had requested for execution of the project beyond the Scheduled Commissioning Date, namely, 18 months from the Effective Date which was expiring on 07.01.2017. The extension of time was sought by the Appellant in terms of Article 2.5 of the PPA on account of the above circumstances which constituted Force Majeure Events affecting the Appellant's project and also the time taken by HESCOM in providing the necessary approval for connectivity and evacuation of power from the Solar Power Project. In the absence of these approvals, the Appellants were not in a position to achieve the financial closure and firm up the funding and financing arrangement from the Banks and Financial Institutions. Further, the Appellants could not have taken the steps in the absence of the conversion of land from agriculture into Non-agriculture. The Appellants therefore, sought for extension of six months from the Scheduled Commissioning Date.

22. The Respondent No. 1, HESCOM after considering the above stated aspects, vide letter dated 04.02.2017 granted extension of time for completing the 2 MW Solar Power Project for a period of six (6) months.

23. The Appellants submit that the above letter dated 04.02.2017 was issued by HESCOM in terms of Article 2.5 of the PPA which, inter-alia, provides that HESCOM is empowered to issue extension without any stipulation as to the approval for such extension to be taken from the State Commission. It is further submitted that, in terms of Article 2.5.6 of the PPA, once such extension is granted, the Scheduled Commissioning Date and the extended date shall be substituted which shall be deemed to be the extended date for the purpose of agreement. In the circumstances mentioned above, upon the issue of the letter dated 04.02.2017, the Scheduled Commissioning Date of the Solar Power Project became 24 months from the Effective Date in place of 18 months and thus, expiring on 07.07.2017. Accordingly, the Appellant became entitled to establish the Solar Power Project by or before 07.07.2017 for the purpose of the PPA dated 07.07.2015 and for tariff provided under the PPA at the rate of Rs 8.40/KwH.

24. On 16.03.2017, the State Commission for the first time issued a communication informing HESCOM that the extension of time should not be considered as a routine exercise except under extraordinary conditions faced by the Project Developer within the scope of the original PPA and directed HESCOM not to issue any extension of time beyond the

Scheduled Commercial Operation Date without obtaining the prior permission of the State Commission.

25. On 05.04.2017, the State Commission directed all ESCOMs to advise the Solar Power Developers to file a Petition before the State Commission in regard to extension of the commissioning date.

26. Thereafter, on 13.04.2017, HESCOM issued a communication to the Appellant advising the Appellants to file a petition before the State Commission for seeking approval for extension of the Scheduled Commissioning Date.

27. On 04.05.2017, the Appellant No. 1 filed a Petition being OP No. 69 of 2017 before the State Commission, inter-alia, challenging the communication dated 13.04.2017 issued by HESCOM.

28. Thereafter, on 23.06.2017, the State Government informed the State Commission that the State Government has accepted the plea of HESCOM in the matter of extension of time to achieve the Commercial Operation Date of the Solar Power Project under the farmer scheme invoking the Force Majeure conditions of the PPA and hence called upon the State Commission to approve such extension of time.

29. On 07.07.2017 the State Commission directed HESCOM to permit the Solar Power Developer to commission the project beyond the original Scheduled Commercial Operation Date subject to the State Commission examining the merits of each case with regard to Force Majeure conditions and the applicable tariff. The State Commission directed the HESCOM to advise the Developer to file a petition before the State Commission justifying their claim for extension of time under the Force Majeure conditions as provided in the PPA. .

30. On 26.10.2017, the Appellant No.2 was impleaded as the Petitioner No.2 in the Petition being OP No.69 of 2017 filed by the Appellant before the State Commission.

31. In the meanwhile, the Appellants had completed and commissioned the project on 08.05.2017 as certified by HESCOM as per the requirements of the PPA and the electricity generated from the project started flowing into the Grid in terms of the provisions of the PPA.

32. On 30.08.2018 the State Commission passed the Impugned order and dismissed the Petition No. 69 of 2017 filed by the Appellant.

33. Aggrieved by the Order dated 30.08.2018, the Appellants are filing the present appeal before this Tribunal.

34. Shri Basava P. Patil, learned senior counsel appearing for the Appellants in Appeal No.342 of 2018 has filed the written submissions for our consideration as under:-

35. That present Appeal has been filed by the Appellants, challenging the order dated 30.08.2018 passed by the Karnataka Electricity Regulatory Commission (**KERC**) in Original Petition No. 69 of 2017. The KERC held that the Appellants are not entitled to extension of time for commission of the solar power project which was approved by HESCOM (**Respondent No. 1**). The Committee upon scrutiny of the relevant documents and considering the delay caused in the implementations of the Appellant's project on account of Land Conversion, KPTCL Tentative & Regular Evacuation Approval had decided to grant an extension of 6 months to the Appellant to achieve COD.

36. The Appellant and HESCOM had entered into a Power Purchase Agreement (PPA) on 07.07.2015 for development of 2 MW solar power plant at Hukkeri village in Hukkeri Taluk, Belgaum.

NOTE 1: The PPA between the Appellant and HESCOM was based on the standard format PPA in respect of Solar Power Plants of 1 – 3 MW projects for Land Owners and institutions, that had been

approved by the KERC by an order dated 16.06.2015. It may be noted that in terms of clause 2.5.3 of the standard format PPA, HESCOM has the authority to approve extension.

NOTE 2:KERC approved the PPA executed between the Appellant and HESCOM on 31.07.2015, 54 days after the signing of the PPA

NOTE 3: KPTCL by its order dated 21.12.2015 issued a guideline for grant of evacuation approval to smaller wind and solar generators. It is submitted that para 5 (g) of the said guidelines allows applicants to ask for land on lease for terminal bay instead of acquiring land on their own, provided payment of lease charges are made. Pertinently, the Appellant had raised a request for setting up of grid connectivity and power evacuation approval on 11 KV Terminal on 04.04.2016, however KPTCL had issued Bay Estimation intimation only on 17.10.2016.

37. The Appellant No. 2 wrote a letter dated 03.12.2016 to HESCOM requesting for extension of time up to 6 months to commission its project in terms of Article 2.5 and 8 of the PPA. Further, GOK in view of various representations made by similarly placed SPPs, issued a direction to all

ESCOMs to constitute a committee and to examine each cases on its own merits. In view of GOK's direction, the Appellant's case for extension of SCOD was considered by a three member Technical Committee by HESCOM. HESCOM by its letter dated 04.02.2017 allowed the Appellant's request for extension and granted 6 months time to commission its plant in terms of Articles 2.5 and 8 of the PPA, categorically stating that the said extension was without altering any other terms and conditions of the PPA.

NOTE: It may be noted that Article 4.2 of the PPA deals with '*Obligations of HESCOM*'.

38. It is submitted that HESCOM under Article 4.2 (d)(iii) had acted in a reasonable manner while granting extension of time to the Appellants after scrutiny by members of the technical committee.

39. The KERC issued a general communication dated 16.03.2017 to all the ESCOMS, stating that ESCOMS could not allow extension of time beyond the SCOD without obtaining prior approval of the Commission, and that the same could be granted under extraordinary circumstances to be proved by the project developer.. The KERC also issued another communication dated 05.04.2017 to all ESCOMS directing them to advice

the concerned SPD/SPV under Land Owners/ Farmer's Scheme to file a petition before the KERC for seeking approval for any extension of COD. Thereafter, HESCOM by its letter dated 13.04.2017, informed that the Commission has issued clarification and advised to file a petition before the Commission.

40. Meanwhile GOK, in response to KERC's letter dated 09.05.2017 wherein the KERC had requested GOK to furnish details of similarly placed solar power projects, issued a letter dated 23.06.2017 to the Secretary, KERC stating that the reason for the extensions issued by ESCOMs were due to Force Majeure and the extensions were done in accordance with the PPAs approved by the KERC, without altering the KERC approved tariff as agreed in the PPA. GOK hence requested the commission to consider approval of the extension of SCOD. In reply to the aforementioned communication, the KERC by its letter dated 07.07.2017 informed GOK that the commission has approved ESCOMs grant of extensions to developers to commission projects beyond original SCODs as per PPA but the tariff applicable in each case shall be examined according to its own merits.

41. It was in this backdrop, the Original Petition No. 69 of 2017 was filed before the KERC by the Appellant, seeking, *inter alia*, (a) to set aside HESCOM's communication dated 13.04.2017 (requiring it to seek KERC's approval to the extension of time already granted by HESCOM), (b) to confirm the extension order of HESCOM dated 04.02.2017 granting extension of 6 months to the Appellant to commission its project, (c) to restrain HESCOM to take any action against the Appellant on account of communication dated 13.02.2017, (d) to declare that the Appellant is entitled to claim Force Majeure conditions, and (e) to declare that the Appellant is entitled to extension of time as per clause 2 of the PPA dated 07.07.2015 without changing any condition of the PPA.

NOTE: Various Original Petitions seeking similar reliefs were filed before the KERC by other similarly placed and affected parties.

42. The KERC passed the Impugned order holding that the Appellant was not entitled to extension of time to commission its project and had failed to prove Force Majeure events. Accordingly, the KERC held the Appellant to be entitled to a reduced tariff of Rs. 4.36/ unit under Article 5.1 of the PPA and also liable to pay liquidated damages under Articles 2.2 and 2.5.7 of the PPA.

43. It is submitted that the Impugned Order is based on assumptions relating to the Appellant not being diligent in implementing the Project. In this regard, it is emphasized that the Appellant had been diligent in implementing the project and had placed all orders for solar modules, power conditioning units, mounting structures, cable and accessories etc. prior to the original scheduled commissioning date (SCOD) of the project as per the PPA. Therefore, it is submitted that but for the force majeure events, the Appellant's project would have been commissioned within the SCOD. Thus, considering the fact that entire investment cumulating into the capital cost of the project was made by the Appellant prior to SCOD, it may be noted that the Appellant does not stand to get any financial benefits of reduced expenditure in any manner by delaying the COD of the project, as has been indicated by KERC in the impugned order.

44. It may be pertinent to note that the Appellant had started the process of obtaining the required documents in prescribed Form (Annexure – 1) as per Rule 106A under Section 95 of the Karnataka Land Revenue Act, 1964, (**KLRA**) for the PTCL certificate and the same was received on 29.02.2016. Upon receiving most of the required documents, the Appellant had applied for Land Conversion on 30.05.2016. Further, under Section 95 (10) of the KLRA, as amended on 13.08.2015, a land shall be deemed to

have been converted upon payment of conversion fine or fees payable, if any. It is submitted that the Appellant received intimation for payment of processing fee for land conversion on 06.09.2016. After the payment of processing fee by the Appellant on 08.09.2016, the Deputy Commissioner issued an Order for Land Conversion on 24.09.2016 after 116 days from the date of Application.

45. It is further submitted that though the final evacuation approval was granted by HESCOM on 29.08.2016, the bay estimate intimation was issued by KPTCL only on 17.10.2016, 1 months after the final evacuation approval came to be granted. It may be pertinent to note that it is only after issuing Evacuation Approval the major works division of ESCOM/KPTCL prepares Bay SLD & Layout drawings with estimation for Bay erection after joint site visit by ESCOM and KPTCL.

NOTE: Along with the prescribed Form (Annexure – 1) as per Rule 106A under Section 95 of KLRA, to obtain a conversion order, the following documents are required to be submitted:

- Record of Rights
- Akarband Certificate
- Nil Encumbrance Certificate for 14 years
- Mutation Entries
- 11E Sketch

- Form 7 & 7A
- PTCL Certificate under the Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Certain Lands) Act, 1978

46. It is submitted that the KERC has erred holding that the Appellants are not entitled to extension of time as granted by HESCOM under the PPA and reducing the tariff from Rs. 8.40 per unit to Rs. 4.36 per unit. In view of aforementioned facts and circumstances, it is submitted that the Appellants are entitled to the tariff of Rs. 8.40 per unit in terms of the PPA dated 07.07.2015 and even otherwise, the present Appellant herein has already spent a total cost of Rs. 1,36,05,009 as on the date of commissioning of its project, therefore the reduced tariff is not sufficient to even met its loan commitments and stay afloat.

NOTE: The Ministry of New and Renewable Energy by its letter dated 09.04.2018 has requested GOK to request KERC to restore original tariff of Rs. 8.40 per unit for 1 – 3 MW Solar Power Plants commissioned under the Land Owned farmers Scheme of Karnataka under Section 108 of the Electricity Act, 2003.

47. It is submitted that HESCOM having approved the extension of time, by 6 months for commissioning of the Appellant's solar power project by its

letter dated 04.02.2017, after scrutiny of relevant documents by members of the technical committee constituted by HESCOM itself, are estopped from taking a contrary stand, more so, since there has been no justifiable reason put forth by HESCOM at any point of time for the change in its stand.

48. In *Shyam Telelink Ltd. v. Union of India*, reported in (2010) 10 SCC 165, the Hon'ble Supreme Court observed as under:

“23. The maxim qui approbat non reprobate (one who approbates cannot reprobate) is firmly embodied in English common law and often applied by courts in this country. It is akin to the doctrine of benefits and burdens which at its most basic level provides that a person taking advantage under an instrument which both grants a benefit and imposes a burden cannot take the former without complying with the latter. A person cannot approbate and reprobate or accept and reject the same instrument.”

49. Also relevant to note is the Hon'ble Supreme Court's observation in *Suzuki Parasrampuriah Suitings Private Limited v Official Liquidator of Mahendra Petrochemicals Limited (in Liquidation) and Ors*, reported in (2018) 10 SCC 707:

“12. A litigant can take different stands at different times but cannot take contradictory stands in the same case. A party cannot be permitted to approbate and reprobate on the same facts and take inconsistent shifting stands. The untenability of an inconsistent stand in the same case was considered in Amar Singh v. Union of India, observing as follows:

“50. This Court wants to make it clear that an action at law is not a game of chess. A litigant who comes to court and invokes its writ jurisdiction must come with clean hands. He cannot prevaricate and take inconsistent positions.”

13. A similar view was taken in *Joint Action Committee of Air Line Pilots' Assn. of India v DGCA*, observing:

“12. The doctrine of election is based on the rule of estoppel ---- the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estopples in pais (or equitable estoppel) which is a rule in equity. ... Taking inconsistent pleas by a party makes its conduct far from satisfactory. Further, the parties should not blow hot and cold by taking inconsistent stands and prolong proceedings unnecessarily.”

50. In the instant case, the impugned order dated 30.08.2018 passed by the KERC in OP No. 69 of 2017 also records as under:

‘5) Upon Notice, the Respondent (HESCOM) appeared through its learned counsel and despite granting sufficient time, did not file the Statement of Objections.

6)The Petitioners submitted their arguments. The learned counsel for the Respondent (HESCOM) submitted that, it would not specifically object to the pleas raised by the Petitioners and that the Respondent (HESCOM) would abide by the Orders of this Commission. Therefore, the arguments of the Respondent were taken as ‘concluded’. ...”

51. In view of the above, it is submitted that the Respondent HESCOM cannot on one hand approve the extension of time on the grounds of force majeure events, and not object to the Appellant’s pleas before the Commission, but on the other hand, in the appellate proceedings before this Tribunal resile from their own act of granting extension by taking a diametrically opposite view. The Respondents ought not to be permitted to approbate and reprobate in this manner.

52. That the Appellant submits that the Article 6 of the PPA dated 07.07.2015 deals with the issue of billing and payment. Article 6.4 of the PPA categorically provides for Late Payment Surcharge, which is being extracted below for ready reference:

“6.4 Late Payment Surcharge: *In the event of delay in payment of a monthly bill being made by HESCOM after the due date, a late payment surcharge shall be payable to the SPD at the rate of 1.0% per month on the bill amount (being ‘Late Payment Surcharge’), computed on a pro rata basis on the number of days of the delay in payment. The Late Payment Surcharge shall be claimed by the SPD through the Supplementary Bill.”*

53. It is further submitted that this Tribunal’s Judgment in *Lanco Amrkantak Power Limited v Haryana Electricity Regulatory Commission* dated 22.05.2019 in Appeal No. 308 of 2017 on payment of interest and the time value of money wherein this Tribunal had held as under:

“93. . . .

iv) Therefore, for equity and restitution payments made at a later stage, of the amount, due in the past, must be compensated by way of appropriate rate of interest so as to compensate for the loss of money value. This is a proven concept of time value of money to safeguard the interest of the receiving party.

v) The Appellant has placed reliance on several judgments passed by this Tribunal in several similar matters wherein it has been clearly brought out that the developers are entitled to interest on the differential amount due to them as a consequence of redetermination of tariff. It has been clarified in various judgments that the interest is not a penal charge if it is fixed according to commercial principles. It is only compensation for the money denied at the appropriate time.

. . . .

vii) The Respondent No. 3 have submitted that interest cannot be paid until the amount is crystallized. It is pertinent to note here that though the

amount was crystallized by the State Commission vide their Impugned Order but the most important fact to be kept in mind is that the State Commission re-determined the tariff from the date of commencement of supply which clearly shows that the due date is the date of commencement of supply. In such matters the crucial point for consideration is that interest is not a penalty or punishment at all. But, it is the normal accretion on capital. Equity demands that the paying party should not only pay back the principal amount but also the interest thereon to the recipient and therefore the argument of the Respondent does not hold ground and needs to be rejected. . . .

54. Therefore, in terms of Article 6.4 of the PPA read with the abovementioned Judgment of this Tribunal, the interest amount is intended to compensate the developer, who was paid a lower tariff than what it was entitled to, the Appellant is entitled to Late Payment Surcharge from the date of commissioning of the project, i.e. 08.05.2017 onwards as HESCOM has been paying the Appellant at the reduced tariff rate of Rs. 4.36/ kwh as against the PPA tariff rate of Rs. 8.40/kwh.

55. It is submitted that, this Tribunal by its judgment dated 27.02.2020 in Appeal No. 368 of 2019 entitled “*Ayana Ananthapurama Solar Power Private Limited v. Andhra Pradesh Electricity Regulatory Commission &Ors.*” categorically held as under:

“61. Over and above this, it is seen that there were Supplementary PSAs to the original PSAs with intermediary procurer extending the existing timelines up to 31.07.2019. The time is further extended by intermediary procurer. To commission the project within the timeframe when approval of procurement of power and adoption of tariff reach finality, that would be the starting time to reach the completion of project in terms of agreements i.e. PPA between the

solar developer and intermediary procurer – NTPC/ SECI, would come into play. Therefore, the contention of the Respondent – AP Discoms that there is delay or going to be delay to achieve SCOD is rejected.”

56. Therefore, it is submitted that the date of approval of the PPA by the KERC would be the starting time to reach the completion of project in terms of the agreements between the SPD and ESCOM.

57. It is also submitted that, this Tribunal in “*Chamundeshwari Electricity Supply Company Ltd. v. Saisudhir Energy (Chitradurga) Pvt. Ltd.*” reported in 2018 SCC OnLine APTEL 65 had held that no formal issuance of Notice is required in cases of force majeure events.

58. Further, the issues involved in the present Appeal are covered by this Tribunal’s judgment dated 28.02.2020 in Appeal No. 340 of 2016 entitled “*Azure Sunrise Private Limited v. Chamundeshwari Electricity Supply Corporation Limited*” wherein this Tribunal has held that once extension of Scheduled Commissioning Date is approved by the concerned DISCOM, question of reduced tariff does not arise.

59. Furthermore, the present Appeal is similar on facts and is squarely covered by this Tribunal’s Order dated 14.09.2020 in Appeal No. 351 of 2018 entitled “*Chennamangathihalli Solar Power Project LLP v. Bangalore*

Electricity Supply Company Limited”, wherein this Tribunal had held as under:

“9.1. Having regard to the deliberations and our analysis, as stated supra, we are of the opinion that there was nothing wrong on the part of KERC to suo motto interfere in the matter. As being a State Regulator, it has jurisdiction to look into affairs of ESCOMS in purchase and supply of powers in the larger interest of consumers. However, as the COD extension was granted under the signed PPA between the parties and after applying, due diligence in the matter considering all prevailing facts and matrix of events, the State Commission ought to have considered the same and approved so as to meet the ends of the justice. Needless to mention that the PPA’s Terms & Conditions were duly approved by the State Commission which crystallised the rights of the parties.”

60. In light of the above facts and arguments is therefore requested that this Tribunal may allow the Appeal relating to a small solar power project developed under land owners farmers category under the Solar Power Policy of the State of Karnataka, given that the delay in commissioning the project has been on account of procedural delay by government authority/intuitional level which were beyond the control of the Appellants. Further, it is prayed that this Tribunal may restore the agreed PPA tariff of Rs.8.40/kwh, and also, grant the consequential relief of interest/ late payment surcharge provided in the PPA on the differential tariff that would be payable to the Appellants for the period commencing from the date of commissioning of the project till date.

61. Shri Shahbaaz Husain, learned counsel appearing for the Respondent No.1 has filed the written arguments for our consideration as under:-

A. Jurisdiction of Karnataka Electricity Regulatory Commission (KERC) to pass the Impugned Order

62. The contention of the Appellant that the KERC is not a party to the Power Purchase Agreement (PPA) and thus, its approval for extension of time is not mandated under law is wholly erroneous and bad in law.

63. It is a settled principle of law that every contract is subject to the applicable statutes and any provision of the contract in so far as it contradicts any law is void to that extent. In the instant case, the Electricity Act, 2003 under Section 86 (1) (b) requires the KERC to regulate electricity purchase and procurement process of the distribution licenses including the price at which electricity shall be procured from the generation companies or licenses or from other sources through agreements for purchase of power for distribution and supply within the state. The purport of Section 86 (1) (b) of the said act is abundantly clear in empowering the KERC to regulate the PPA and the clauses thereof in such manner as it may deem fit.

64. The Commission has the exclusive jurisdiction to determine the tariff payable for purchase of energy by distribution license. Therefore, any agreement or contract between the distribution licensees and the generator can be subject to the scrutiny by the Commission to ascertain the reasonability and validity of the tariff payable by the generators. The validity of any terms of the contract affecting the tariff rate is always subject to the scrutiny by the commission.

65. The Hon'ble Supreme Court has held that the State Commission has powers to revisit the tariff of a concluded PPA, should the same be in furtherance of public interest. In *Gujrat Urja Vikas Nigam Limited Vs. Tarini Infrastructure Ltd. And Ors.*, reported in **AIR 2016 SC 5580**, the Hon'ble Supreme Court has settled this issue by ruling that:

*“10.....In the Present case, admittedly, the tariff incorporated in the PPA between the generating company and the distribution licensee is the tariff fixed by the State Regulatory Commission in exercise of its statutory powers. **In such a situation it is not possible to hold that the tariff agreed by and between the parties, though finds mention in a contractual context, is the result of an act of volition of the parties, which can, in no case, be alternate except by mutual consent.** Rather, it is a determination made in the exercise of statutory powers which got incorporated in a mutual agreement between the two parties involved.*

15. As already noticed, Section 86(1)(b) of the Act empowers the State Commission to regulate the price of sale and purchase of electricity between the generating companies and distribution licensees through agreements for power produced for distribution and supply. As held by this Court in *Sri Venkata Setaramanjaneya Rice & Oil Mills and Ors. Vs. State of A.P. (supra)*, *K. Ramanathan Vs. State of T.N. & Anr. (supra)* and *D.K.Trivedi & Sons Vs. State of*

Gujarat & Ors. (supra) the power of regulation is indeed of wide import.

The following extracts from the reports in the above cases would illuminate the issue.

Sri Venkata Setaraman Janeya Rice & Oil Mills and Ors. Vs. State of A.P. (supra)

“20. Then it was faintly argued by Mr. Setalvad that the power to regulate conferred on the respondent by Section 3 (1) cannot include the power to increase the tariff rate; it would include the power to reduce the rates. This argument is entirely misconceived. The word “regulate” is wide enough to confer power on the respondent to regulate either by increasing the rate, or decreasing the rate, the test being what is it that is necessary or expedient to be done to maintain, increase, or secure supply of the essential articles in question and to arrange for its equitable distribution and its availability at fair prices.

.....”

K. Ramanathan V .State of T.N. & Anr. (supra)

“18. The word “regulation” cannot have any rigid or inflexible meaning as to exclude “prohibition”. The word “regulate” is difficult to define as having any precise meaning. It is a word of broad import, having a broad meaning, and is very comprehensive in scope. There is a diversity of opinion as to its meaning and its application to a particular state of facts, some courts giving to the term a somewhat restricted, and others giving to it a liberal, construction. The different shades of meaning are brought out in Corpus Juris Secundum, Vol. 76at p.611:

„Regulate“ is variously defined as meaning to adjust; to adjust, order, or govern by rule, method, or established mode; to adjust or control by rule, method, or established mode, or governing principles or laws; to govern; to govern by rule; to govern by, or subject to, certain rules or restrictions; to govern or direct according to rule; to control, govern, or direct by rule or regulations.

„Regulate“ is also defined as meaning to direct; to direct by rule or restriction; to direct or manage according to certain standards, laws, or rules; to rule; to conduct; to fix or establish; to restrain; to restrict.” See also: Webster’s Third New International Dictionary, Vol. II, p. 1913 and Shorter Oxford Dictionary, Vol. II, 3rd Edn., p. 1784

16. *All the above would suggest that in view of [Section 86 \(1\) \(b\)](#) the Court must lean in favour of flexibility and not read inviolability in terms of the PPA insofar as the tariff stipulated therein as approved by the Commission is concerned. It would be a sound principle of interpretation to confer such a power if public interest dictated by the surrounding events and circumstances require are view of the tariff.”*

66. The Hon’ble Supreme Court in the above judgment has laid out the ratio that the State Commission under Section 86 (1) (b) of the Electricity Act, 2003 is empowered to regulate the tariff of a concluded PPA if the same is in warrant in public interest even in the absence of any such powers being vested in the State Commission in the PPA. In the instant case, the PPA (Article 5.1) itself provides for a varied KERC (if it’s lower than Rs. 8.40/unit) in the event of delay in commissioning of the project. Admittedly, there is a delay of over five months in the commissioning of the project and the varied KERC tariff as on the date of commissioning of the project was Rs. 4.36/unit, which is lower than 8.40/unit; thus, becoming applicable tariff.

67. A lower tariff is always in the best interest of public as the tariff being paid by the Respondent gets passed on to the consumers. Wherefore, in conformity with the provisions of PPA, the KERC had the lawful right to regulate the tariff in the instant case.

68. The Appellant has erroneously relied on the judgments of Hon’ble

Supreme Court in *Gurath Urja Vikas Nigam Limited v EMCO Ltd and Anr* (2016 (2) SCALE 75) And *Bangalore Electricity Supply Company v. Konark Power Projects Ltd.* 2015 (5) SCALE711 to state that a tariff arrived at in a concluded PPA cannot be revisited. The Hon'ble Supreme Court in above quoted judgement - **Gujrat Urja Vikas Nigam Limited Vs. Tarini Infrastructure Ltd. And Ors.**, reported in **AIR 2016 SC 5580**, has distinguished the said judgments relied upon by the Appellant.

69. Therefore, it is a settled provision of law that a tariff under PPA can be revisited by the KERC in the larger public interest. This being the case, the next issue is whether the KERC can suo moto issue directions to the Respondent no.1 to not allow the extension of time under PPA, when it is not a party to the PPA. This issue has been positively settled by the Hon'ble Supreme Court in the following judgment.

70. The Hon'ble Supreme Court in **All India Power Engineer Federation & Ors. Vs. Sasan Power Ltd. & Ors. Etc., Civil Appeal No. 5881-82/2016, dated 08.12.2016** held that to uphold public interest; the KERC is the only body that can adjudicate on tariff matters. The following was held:

“All this would make it clear that even if a waiver is claimed of some of the provisions of the PPA, such waiver, if it affects tariffs that are ultimately payable by the consumer, would necessarily affect public interest and would have to pass muster of the Commission under Sections 61 to 63 of the Electricity Act. This is for the reason that what is adopted by the Commission under Section 63 is only a tariff obtained by competitive bidding in conformity with guidelines issued. If at any subsequent point of time such tariff is increased, which increase is outside the four corners of the PPA, even in cases covered by Section 63, the legislative intent and the language of Sections 61 and 62 make it clear that the Commission alone can accept such amended tariff as it would impact consumer interest and therefore public interest.”

71. Delay in commissioning of the project has an impact on the tariff applicable on the supply of power from the power plant and the Commission has the exclusive jurisdiction to determine the tariff for supply of electricity to a distribution Licensee. The extension of time for commission of the project if allowed would entitle the Appellant to higher tariff, which would not be justified or fair. The payment of higher tariff would result in higher tariff to the consumer, there by adversely affecting public interest. The following facts will clearly establish the public interest involved in the instant case:

- (a) The State Commission vide its order dated 10/10/2013 had fixed solar tariff at Rs. 8.40/- for projects commissioning on or after 01/04/2013. Thereafter, the same was reduced to Rs.6.51 vide its order date 30/07/2015 for projects commissioning on or after 01/09/2015. The State

Commission further reduced the tariff to Rs. 4.36 vide its order dated 12/04/2017 for projects commissioning on or after 01/04/2017. The State Commission has further reduced the tariff to Rs.3.05 vide its order dated 18/05/2018 for projects commissioning after 01/04/2018.

- (b) The above tariff orders of the State Commission indicate a downward trend in the solar tariff on account of advancement in technology and reduction in capital cost for solar projects. Wherefore, if a generator has delayed in commissioning the project, the cost of such a project is bound to substantially come down as the market capital rate for such projects has been declining year on year. The cost of the project, on account of delay, will be much lower than the cost that was anticipated for such projects at the time of entering into PPA. In order to cater to this trend, the PPA has a clause for lower varied tariff as on the date of commissioning.
- (c) Financial assistance was sought and investment was made in 2016 by the Appellant; thus, incurring much lesser capital cost than what was anticipated in the 2013 tariff order of KERC providing tariff of Rs.8.40. Wherefore such reduction

of cost shall in all fairness be passed on to the consumers by reducing the tariff under Article 5.1 of the PPA.

72. Thus, the Commission was justified in reducing the tariff.

B. No dispute between the Appellant and Respondent no.1

73. The Appellant's averment that the Respondent no.1 has agreed to extend SCOD and hence there cannot be a dispute between the Appellant and Respondent no.1, requiring adjudication of KERC is wholly erroneous and incorrect.

74. The Respondent no.1 being a licensee of the KERC is duty bound to follow the directions of KERC. Also, under Section 86(1)(b), the KERC being the regulator of the terms of PPA, is empowered to issue directions to Respondent no.1 in best interest of public.

C. Delay in Commissioning of the Project is directly attributable actions and omissions of the Appellant

75. The contention of the Appellant that the delay in commissioning of the project was caused by Government Authorities in granting land conversion order and evacuation approval is factually incorrect. On the contrary, the delay is primarily the result of negligence on the part of Appellant in implementation of the solar project.

76. The PPA was executed on 07.07.2015, which also is the effective date of PPA. The Appellant was duty bound to complete the project and commission the same within 18 months of the effective date, i.e., 07.01.2017. However, the project came to be commissioned on 08.05.2017, with a delay of more than five months.

77. Had the Appellant been diligent in not causing the above tabled delays, the project would have commission well within the Schedule Commercial Operation Date (SCOD), which fact also proves that the Government authorities or the Respondent has not caused undue delay in performing their duties or obligations.

78. Furthermore, the Appellant has not produced any document or detail to show that efforts were made on its part to follow up with the concerned authorities and expedite the process. The Appellant having not disclosed its efforts, if any in expediting the process and having not proved that the delay is purely attributable to the conduct of concerned authorities, cannot claim that delay was beyond its control or that it's covered under the force majeure clause

79. The Appellant has admitted to the above stated delays on its part in **Para 9(S) of the Appeal** by stating that "*The state commission failed to*

note the force majeure events and that these events were beyond the control of the Appellants specifically pleaded by the Appellant for the delayed implementation of the project” Wherefore, it is not disputed that the delay has been caused by the Appellant. The Appellant is merely stating that such delay cannot be looked into. However, such a statement is erroneous in terms of Article 8.3 (b) (v) of the PPA, which explained in the subsequent paragraphs.

80. The Appellant has also violated Article 2.1.3 of the PPA which requires the Appellant to intimate the Respondent on a monthly basis about the progress being made in achieving conditions precedent. The Appellant did not provide any such monthly intimation and only wrote about the same on 03.12.2016.

D. Force Majeure does not attract

81. The Appellant falsely contends that the delay in achieving SCOD is on account of force majeure events and hence the same shall be condoned by extending the SCOD. As explained supra, the delay in achieving SCOD is directly attributable to the delays of the Appellant in applying for various permission and the same stands admitted by the Appellant in para 9(s) of the Appeal.

82. Article 8 (v) of the PPA provides for the force majeure events and also the conditions for their applicability. Article 8.3(b) of the PPA restricts the applicability of force majeure clause and Appellant has failed to comply with the same.

83. The Force Majeure clause in no way excuses the obligations of a party that are prior to the occurrence of Force Majeure Events. In the instant case, the Appellant admittedly has horribly failed in reasoning the delays in filing various applications before the Government Authorities, which delay, as provided in the above clause, cannot be excused. Therefore, the Appellant's delay in execution of the project cannot be condoned.

E. State Government Recommendation

84. The Appellant's submission that a three-member committee of the Government of Karnataka (GOK) has ruled that the Appellant is entitled to extension of time to commission the project and hence, the SCOD shall stand extended, is against the principles and basic structure of the Electricity Act, 2003.

85. Under the said Act, the government has no jurisdiction to decide on

the tariff issues and the same falls within the exclusive jurisdiction of KERC (Section 62 r/w 86(1)(b) of the Act).

86. Admittedly the State Government Policies have been subjected to the tariff determined by the State Commission from time to time. As established supra, the Commission being the custodian of public interest and the authority to determine tariff has a right to decide on the quantum of tariff inconformity with the provisions of PPA. Moreover, the tariff determination is the exclusive domain of State Commission and the State Policies cannot have a bearing on the tariff determined by the State Commission.

87. The GOK has no role in the tariff matters and has not evaluated the situation from the Electricity Act's point of view, which provides for a low and just tariff to consumers.

88. In light of the above submissions and facts, it is most humbly prayed that this Tribunal be pleased to dismiss the above appeal in its entirety by imposing costs on the Appellant.

Analysis and decision:

89. We have heard learned senior counsel appearing for the Appellants and learned counsel for the Respondents at considerable length of time and have gone through carefully their written submissions/arguments and also taken note of the relevant decisions available on records.

90. The following Clauses of the PPA are relevant for the purpose of considering the above Appeal on merits:

- (viii) **“Commercial Operation Date”** with respect to the Project shall mean the date on which the Project is available for commercial operation as certified by HESCOM/KPTCL as the case may be:
- (xxxi) **“Scheduled Commissioning Date”** shall mean 18 (Eighteen) months from the Effective Date.

CONDITIONS PRECEDENT

2.1 Conditions Precedent:

The obligations of HESCOM and the SPD under this Agreement are conditional upon the occurrence of the following in full within 365 days from the effective date.

2.1.1

- (i) *The SPD shall obtain all permits, clearances and approvals (whether statutory or otherwise) as required to execute and operate the Project (hereinafter referred to as “Approvals”):*
- (ii) *The Conditions Precedent required to be satisfied by the SPD shall be deemed to have been fulfilled when the SPD shall submit:*
 - (a) *The DPR to HESCOM and achieve financial closure and provide a certificate to HESCOM from the lead banker to this effect;*
 - (b) *All Consents, Clearances and Permits required for supply of power to HESCOM as per the terms of this Agreement; and*
 - (c) *Power evacuation approval from Karnataka Power Transmission Company Limited or HESCOM, as the case may be.*

2.1.2 SPD shall make all reasonable endeavors to satisfy the Conditions Precedent within the time stipulated and HESCOM

shall provide to the SPD all the reasonable cooperation as may be required to the SPD for satisfying the Conditions Precedent.

2.1.3 *The SPD shall notify HESCOM in writing at least once a month on the progress made in satisfying the Conditions Precedent. The date, on which the SPD fulfills any of the Conditions Precedent pursuant to Clause 2.1.1, it shall promptly notify HESCOM of the same.*

2.2 Damages for delay by the SPD

2.2.1 *In the event that the SPD does not fulfill any or all of the Conditions Precedent set forth in Clause 2.1 within the period of 365 days and the delay has not occurred for any reasons attributable to HESCOM or due to Force Majeure, the SPD shall pay to HESCOM damages in an amount calculated at the rate of 0.2% (zero point two per cent) of the Performance Security for each day's delay until the fulfillment of such Conditions Precedent, subject to a maximum period of 60 (Sixty) days. On expiry of the said 60 (Sixty) days, HESCOM at its discretion may terminate this Agreement.*

2.3 Performance Security

2.3.1 *For due and punctual performance of its obligations relating to the Project Under this Agreement, the SPD has delivered to HESCOM, simultaneously with the execution of this Agreement, on irrevocable and revolving bank guarantee from a scheduled bank acceptance to HESCOM for an amount of Rs. 10,00,000/- per MW (Rupees Ten Lakhs per Mega Watt only) ("Performance Security"). The Performance Security is furnished to HESCOM in the form of bank guarantees in favour Managing Director of the HESCOM as per the format provided in Schedule 2 and having validity up to 24 months from the date of signing of this agreement. The details of the bank guarantee furnished towards the Performance Security is given below:*

Bank Guarantee No. PBG 2015/4 dated 19.06.2015 for an amount of Rs. 30,00,000/- (Rupees Thirty Lakhs only).

2.3.2 Appropriation of Performance Security

Upon occurrence of delay in commencement of supply of power to HESCOM as provided in clause 2.5.7, or failure to meet the Conditions Precedent by the SPD, HESCOM shall, without prejudice to its other rights and remedies hereunder or in law, be

entitled to encash and appropriate the relevant amounts from the Performance Security as Damages. Upon such encashment and appropriation from the Performance Security, the SPD shall, within 30 (thirty) days thereof, replenish, in case of partial appropriation, to its original level the Performance Security, and in case of appropriation of the entire Performance Security provide a fresh Performance Security, as the case may be, and the SPD shall, within the time so granted, replenish or furnish fresh Performance Security as aforesaid failing which HESCOM shall be entitled to terminate this Agreement in accordance with Article 9.”

2.4 Release of Performance Security

2.4.1 *Subject to other provisions of this Agreement, HESCOM shall release the Performance Security, if any after scheduled commissioning of the project;*

2.4.2 *The release of the Performance Security shall be without prejudice to other rights of HESCOM under this Agreement.*

“2.5 Extensions of Time

2.5.1 *In the event that the SPD is prevented from performing its obligations under Clause 4.1 by the Scheduled Commissioning Date due to:*

- (a) Any HESCOM Event of Default; or*
- (b) Force Majeure Events affecting HESOM; or*
- (c) Force Majeure Events affecting the SPD.*

2.5.2 *The Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to the reasons and limits prescribed in Clause 2.5.1 and Clause 2.5.3 for a reasonable period but not less than ‘day for day’ basis, to permit the SPD or HESCOM through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or HESCOM, or till such time such Event of Default is rectified by HESCOM.*

2.5.3 *In case of extension occurring due to reasons specified in clause 2.5.1(a), any of the dates specified therein can be extended, subject to the condition that the Scheduled Commissioning Date would not be extended by more than 6 (six) months.*

2.5.4 *In case of extension due to reasons specified in Article 2.5 (b) and (c), and if such Force Majeure Event continues even after a*

maximum period of 3 (three) months, any of the Parties may choose to terminate the Agreement as per the provisions of Article 9.

2.5.5 *If the Parties have not agreed. Within 30 (thirty) days after the affected Party's performance has ceased to be affected by the relevant circumstance, on the time period by which the Scheduled Commissioning Date or the Expiry Date should be deferred by, any Party may raise the Dispute to be resolved in accordance with Article 10.*

2.5.6 *As a result of such extension, the Scheduled Commissioning Date and the Expiry Date newly determined date shall be deemed to be the Scheduled Commissioning Date and the Expiry Date for the purposes of this Agreement."*

2.5.7 ***Liquidated damages for delay in commencement of supply of power to HESCOMs.***

Subject to the other provisions of this agreement, if the SPD is unable to commence supply of power to HESCOM by the scheduled commissioning date, the SPD shall pay to HESCOM, liquidated damages for the delay in such commencement of supply of power as follows:

- (a) For the delay up to one month- amount equivalent to 20 % of the performance security.*
- (b) For the delay of more than one month up to three months - amount equivalent to 40 % of the performance security.*
- (c) For the delay of more than three months up to six months - amount equivalent to 100 % of the performance security.*

For avoidance of doubt, in the event of failure to pay the above mentioned damages by the SPD, the HESCOM entitled to encash the performance security."

4.1 ***Obligations of the SPD:***

- (a) The SPD shall construct the Project including the pooling station, the interconnection facilities and metering arrangements at the point of delivery of power as approved by STU /HESCOM.*
- (b) The SPD shall undertake by itself or by any other person acting on its behalf, at its own cost, construction/up-gradation of (a) the interconnection Facilities, (b) the transmission lines; and (c) metering arrangements with protective gear as per the*

specifications and requirements of STU/HESCOM, as notified to the SPD.

- (c) The SPD shall achieve scheduled date of completion and the commercial operation within 18 months from the effective date.*
- (d) The SPD shall by itself or by any other person acting on its behalf undertake at its own cost maintenance of the interconnection facilities and the metering arrangements, including the dedicated transmission line up to the delivery point as per the specifications and requirements of STU/HESCOM, as notified to the SPD, in accordance with Prudent Utility Practices. The transmission / distribution line so constructed shall remain as dedicated transmission / distribution line without provision for any tapping.*
- (e) The SPD shall operate and maintain the Project in accordance with Prudent Utility Practices, for the entire term of this agreement.*
- (f) The SPD shall be responsible for all payments on account of any taxes, cesses, duties or levies imposed by the GoK or its competent statutory authority on the land, equipment, material or works of the Project or on the Electricity generated or consumed by the Project or by itself or on the income or assets owned by it.*
- (g) The benefits accruing on account of carbon credit shall be shared between the SPD and the HESCOM as per Clause 5.2.*

4.2 Obligations of HESCOM:

HESCOM agrees:

- (a) To allow SPD to the extent possible to operate the Project as a must run generating station subject to system constraints.*
- (b) Subject to system constraints to off-take and purchase the Electricity generated by the SPD at the Delivery Point as per Clause 3.4 and Clause 3.5 of this agreement.*
- (c) To make tariff payments to the SPD as set out in Clause 5.1.*
- (d) HESCOM agrees to provide support to the SPD and undertakes to observe, comply with and perform, subject to and in accordance with the provisions of this Agreement and the Applicable Laws, the following:*

(i) support, cooperate with and facilitate the SPD in the implementation and operation of the Project in accordance with the provisions of this Agreement;

(ii) not do or omit to do any act, deed or thing which may in any manner be violative of any of the provisions of this Agreement;

(iii) act reasonably, while exercising its discretionary power under this Agreement;

.....”

6.4 Late Payment surcharge:

“In the event of payment of the monthly bill being made by HESCOM after the due date, a late payment surcharge shall be payable to the SPD at the rate of 1.0% per month on the bill amount (being “Late Payment Surcharge”), computed on a pro rata basis on the number of days of the delay in payment. The Late Payment Surcharge shall be claimed by the SPD through the Supplementary Bill.”

8.1 Definitions:

In this Article, the following terms shall have the following meanings:

8.2 Affected Party:

An Affected Party means HESCOM or the SPD whose performance has been affected by an event of Force Majeure.

8.3 Force Majeure Events:

(a) Neither Party shall be responsible or liable for or deemed in breach hereof because of any delay or failure in the performance of its obligations hereunder (except for obligations to pay money due prior to occurrence of Force Majeure events under this Agreement) or failure to meet milestone dates due to any event or circumstance (a "Force Majeure Event") beyond the reasonable control of the Party affected by such delay or failure, including the occurrence of any of the following:

(i) Acts of God;

(ii) Typhoons, floods, lightning, cyclone, hurricane, drought, famine, epidemic, plague or other natural calamities;

- (iii) *Strikes, work stoppages, work slowdowns or other labour dispute which affects a Party's ability to perform under this Agreement;*
- (iv) *Acts of war (whether declared or undeclared), invasion or civil unrest;*
- (v) *Any requirement, action or omission to act pursuant to any judgment or order of any court or judicial authority in India (provided such requirement, action or omission to act is not due to the breach by the SPD or HESCOM of any Law or any of their respective obligations under this Agreement);*
- (vi) *Inability despite complying with all legal requirements to obtain, renew or maintain required licenses or Legal Approvals;*
- (vii) *Fire, Earthquakes, explosions, accidents, landslides;*
- (viii) *Expropriation and/or compulsory acquisition of the Project in whole or in part;*
- (ix) *Chemical or radioactive contamination or ionizing radiation; or*
- (x) *Damage to or breakdown of transmission facilities of either Party;*
- (b) *The availability of the above item (a) to excuse a Party's obligations under this Agreement due to a Force Majeure Event shall be subject to the following limitations and restrictions:*

 - (i) *The non-performing Party gives the other Party written notice describing the particulars of the Force Majeure Event as soon as practicable after its occurrence;*
 - (ii) *The suspension of performance is of no greater scope and of no longer duration than is required by the Force Majeure Event.*
 - (iii) *The non-performing Party is able to resume performance of its obligations under this Agreement, it shall give the other Party written notice to that effect;*
 - (iv) *The Force Majeure Event was not caused by the non-performing Party's negligent or intentional acts, errors or omissions, or by its negligence/failure to comply with any material Law, or by any material breach or default under this Agreement;*

(v) *In no event shall a Force Majeure Event excuse the obligations of a Party that are required to be completely performed prior to the occurrence of a Force Majeure Event.*”

“10.3 Dispute Resolution

10.3.1 : *If any dispute is not settled amicably under clause 10.2 the same shall be referred by any of the parties to the KERC for dispute resolution in accordance with the provisions of the Electricity Act, 2003.*”

91. Based on the above pleadings, oral arguments and written submissions of all the parties, the following points arise for our consideration:

(A) “Whether the State Commission had jurisdiction to entertain the Petition?”

(B) “Whether the Respondent Commission was justified in passing the impugned order reducing the agreed tariff between the parties?”

92. So far as point no. 1 is concerned, the authority of the Respondent Commission to determine the tariff, if adversely affects public interest, being the only body which could adjudicate the tariff matters is no more *res integra*. This Tribunal on more than one occasion and so also the Hon’ble Supreme Court of India has opined that the State Commission has exclusive jurisdiction to determine the tariff for supply of electricity being

the only adjudicatory body so far as tariff matters. We rely upon the Judgment in **All India Power Engineer Federation** in Civil Appeal No. 5881-5882 dated 08.12.2016 which was followed by this Tribunal in Appeal No. 351 of 2018 in **Chennamangathihalli**'s case.

93. The next issue/point which falls for our consideration is whether the Respondent Commission acted judiciously while considering the facts and circumstances pointed out by the parties to arrive at the conclusion in the impugned order?

94. To decide the above issue, we have to refer to the following list of dates on which the application for approval/sanctions came to be filed by the Appellant and the dates on which these consents, approvals and sanctions came to be issued for the purpose of commissioning the project of the Appellants within the time limits as agreed upon between the parties:

- (a) 16.06.2015 – Pursuant to submission of format PPA by KREDL, KERC approved the standard format of PPA of the solar power plants.

- (b) 07.07.2015 – The SPD and HESCOM entered into a Power Purchase Agreement (PPA) for supply of power from 2 MW solar power plants at Hukkeri village, Hukkeri Taluk, Belagavi.
- (c) 31.07.2015 – KERC approval of the PPA dated 07.07.2015 executed between HESCOM and SPD.
- (d) 04.04.2016 – Submission of application for grid connectivity and power evacuation approval on 11 kv systems.
- (e) 30.05.2016 – Submission of land conversion application in respect of lands in Sy. No. 552/1, 552/2, 553 A/1 of Hukkeri village.
- (f) 06.04.2016 – Issue of power Evacuation payment of processing fee and the same being paid on 15.04.2016.
- (g) 26.04.2016 – Incorporation of SPV as per the terms and conditions of the PPA.
- (h) 08.09.2016 – Payment of non-agriculture conversion processing fees towards land in Sy. No. 552/1, 552/2, 553 A/1 of Hukkeri village.

- (i) 03.05.2016 – SPD executed Assignment deed with Petitioner for execution of 2 MW solar power project and assigning all the rights and liabilities of the PPA.
- (j) 24.09.2016 – DC Belagavi orders the conversion of project land into NA.
- (k) 04.08.2016 – Issue of provisional approval for the evacuation scheme of 2 MW power on 11 kv reference to 110/33/11 kv Hukkeri Sub-station from the proposed solar power project.
- (l) 16.09.2016 – Petitioner executed supplemental PPA with HESCOM.
- (m) 29.08.2016 – Issue of final approval for the evacuation scheme of 2 MW power on 11 kv reference to 110/33/11kv Hukkeri Sub-station from the proposed solar power project.
- (n) 07.10.2016 – KERC approval of the Supplemental PPA dated 16.09.2016.
- (o) 30.06.2016 & 13.10.2016 – Furnishing the progress achieved report of 2 MW solar power project.

- (p) 03.12.2016 – Request for extension of time for commissioning the solar power project by 6 months as per article 2.5 of PPA.
- (q) 24.12.2016 – CEIG (Chief Electrical Inspector to Govt.) approval of drawings pertaining to the electrical installations of 2 MW solar power project.
- (r) 04.02.2017 – Approval for time extension for completing 2 MW solar power project from HESCOM.
- (s) 13.04.2017 – Directions issued by HESCOM and advising the petitioner to file a petition before the Commission for seeking approval for the extension of the commissioning date.
- (t) 30.08.2018 – The Commission passed the impugned order.

95. According to the Appellants, on account of securing approvals from various authorities to considerable time, though they were not responsible for the delay to secure several approvals required for commissioning the project, they had to seek for extension of time for commissioning the project on the ground of force majeure, but the Respondent Commission has not exercised its judicious mind in appreciating the facts on record by passing the impugned order; therefore, it has to be set aside.

96. According to the Respondent HESCOM's counsel, if only the Appellants were diligent in approaching various authorities to secure the required approvals/sanctions for commissioning the project, there would not have been delay to commission the project; therefore, according to the Respondent's counsel, the impugned order is sustainable.

97. According to Appellants, since the Respondent HESCOM granted extension of time on 04.02.2017, there was no justification for the Respondent Commission to direct the Generator to file Petition seeking approval of extension of the commissioning date. Over and above, there is no justification for the Respondent Commission to opine that the Appellant failed to complete 2 MW solar power project within original SCOD and thereby reducing the agreed tariff of Rs.8.40 to Rs.4.36.

98. As against these arguments of the Appellants, the Respondent's counsel justifying the impugned order contends that the Respondent regulator being the statutory authority constituted under the Electricity Act was empowered to look into the approval of the extension granted by the Respondent HESCOM to uphold the public interest. He further contends that having exclusive jurisdiction to determine the tariff for supply of electricity to distribution licensee, the Commission could interfere and it is not beyond the jurisdiction of the Respondent Commission.

99. It is not in dispute that in terms of standard format of the PPA approved by the State Commission for solar power plants under Farmers' Scheme, the Solar Power Developer and the Respondent HESCOM entered into Power Purchase Agreement on 07.07.2015. In terms of this PPA, 18 months' time line from the effective date was available to the Appellant to complete and commission the solar project. It is also no more *res integra* what amounts to effective date. This Tribunal's Judgments in the case of **Azure Sunrise Private Limited** in Appeal No. 340 of 2016 dated 28.02.2020 and **SEI Aditi Power Private Limited** in Appeal No. 360 of 2019 dated 14.07.2021 and so also in **SEI Diamond Private Limited** in Appeal No. 374 of 2019 opined that the effective date is not the date on which the parties signing the PPA, but it is the date on which PPA is approved so as to implement the terms and conditions of the PPA. In this case, the PPA was approved on 31.07.2015. Therefore, one has to count 18 months from 31.07.2015 which would be by or before 31.01.2017.

100. It is also not in dispute that in the approved PPA, there is a provision for extension of time of 18 months up to a maximum of six months by the Respondent HESCOM on force majeure grounds. This PPA was not only approved, but prior to that even the standard format of PPA having such clause submitted for approval of KERC which was approved and all the

ESCOMs in the State followed the same format that was approved by the State Commission.

101. It is also seen that on 03.12.2016, the Appellant approached HESCOM seeking extension of time for commissioning the solar plant by six months, which was accordingly granted by HESCOM on 04.02.2017. After this approval at the instance of the HESCOM, in terms of direction of the State Commission, the HESCOM advised the Appellant to file Petition before the Commission seeking approval of the extension of commissioning of the solar plant. In that process, this impugned order came to be passed.

102. The extension sought by the Appellant was based on force majeure event i.e., delay in obtaining several approvals required for commissioning of the solar project of the Appellant. In this regard, we have to refer to certain dates to analyze whether there was any negligence or carelessness on the part of the Appellants in pursuing various authorities to get required approvals/sanctions.

- (a) After approval of the PPA on 31.07.2015, the Appellant approached several authorities seeking required approvals.

- (b) On 04.04.2016, application for grid connectivity and power evacuation approval was requested, payment of processing fee was paid on 15.04.2016 and provisional approval for the evacuation of the scheme was granted on 04.08.2016.
- (c) On 30.05.2016, the Appellant applied for land conversion in respect of the land upon which the solar plant had to come i.e., Hukkeri Village.
- (d) Only on 08.09.2016, the Appellant was asked to pay conversion charges.
- (e) On 24.09.2016, Deputy Commissioner of Belagavi issued orders pertaining to conversion of agricultural land to industrial purpose. Since the solar plants were to come under Farmers' Scheme where most of the land owners were not aware of the process of approaching several authorities for obtaining sanctions required for the project, the Solar Power Developer was permitted to incorporate Special Purpose Vehicle. This incorporation was done on 26.04.2016. Thereafter, the SPD executed Assignment Deed assigning all rights and liabilities under the PPA in favour of the 1st Appellant i.e., the SPV.

- (f) Finally, approval for the evacuation of the power from the proposed solar project of the Appellant was issued on 29.08.2016.
- (g) Supplemental Agreement came to be executed between the parties on 16.09.2016 which was approved on 07.10.2016 by the Respondent Commission. After this approval of the Supplemental PPA on 03.12.2016 as stated above, the Appellant sought for extension of commissioning of the solar project.
- (h) On 24.12.2016, the Chief Electrical Inspector to Government (CEIG) approved drawings pertaining to the electrical installation of the solar project.
- (i) It is seen that the bay estimate intimation came to be issued by KPTCL only on 17.10.2016. Therefore, the Appellant was justified in saying that major works of division of ESCOM/KPTCL i.e., like preparation of bay lay out, drawings estimation for bay erection after joint visit by ESCOM had to be done. In other words, till 17.10.2016, they could not proceed with these works.

103. As stated above, in terms of extension of time by the HESCOM, the Scheduled Commissioning Date would automatically be extended by six months. In other words, the project had to be completed within 24 months from effective date in terms of PPA. But from the date of approval of the PPA, it would be 30.08.2017. Subsequent filing of the Petition as directed by HESCOM, it is noticed that on 23.06.2017, the State Government informed the Commission that the State Government has accepted the plea of the HESCOM in the matter of extension of time i.e., delay to achieve the Commercial Operation Date on the ground of force majeure event, therefore, called upon the State Commission to approve the extension of time. Similarly, MNRE also opined that there has to be extension of time for commissioning of the project on the ground of force majeure event.

104. So far as the above extension of COD of the project, according to the Respondents, the Government had no authority to direct the State Commission to act in a particular manner. Therefore, there was no obligation on the part of the Respondent Commission to obey the directions of the State Government. Hence, according to Respondent Commission, this direction of the State Government issued on 23.06.2017 would not endeavour to the benefit of the Appellant.

105. So far as independence of the State Commission, we do agree that the State Commission is a neutral body and was required to function and discharge its duties independently without being influenced by any other matter. But it does not mean that the State Commission can ignore the existing facts and circumstances in which the delay has occurred. The State Commission is required to act judiciously while considering the facts and circumstances to analyze whether there was intentional negligence or carelessness on the part of the Appellant. The powers vested with the Commission to analyze these facts and come to a conclusion must be exercised in a judicious manner.

106. The facts in the Appeal goes to show that on the request of the Appellant to HESCOM, the HESCOM without objecting or finding fault with the action of the Appellant in pursuing the matter with various Governmental Instrumentalities so far as delay in securing several approvals and permissions, granted extension of time for commissioning of the project on force majeure event.

107. In turn, the HESCOM had placed all the facts before the three member Committee constituted by the State Government as noticed in several other Appeals on the representation of the Solar Plant Developers. The three member Committee after taking into consideration,

recommended for extension of time for commissioning of the solar projects of the farmers under the Farmers' Scheme. This cannot be ignored totally. That is where the judicious mind of the Commission has to come into play. It was required to consider the very same set of facts upon which the HESCOM granted extension of time so also the Government of Karnataka recommended for extension of time, cannot be considered likely.

108. It is seen that the Government of Karnataka brought in its special scheme for promoting renewable energy generation to harness the solar sources available in the State. This was meant to create opportunities to land owning farmers. In response to the promotion of the solar development by Government of Karnataka, several farmers including the Appellant came forward to set up solar plants. We judiciously take notice of the facts which were discussed/considered in other Appeals that in terms of guidelines issued by the State Government for developing solar project, there was a mention that the land used for setting up of the solar plant requires land conversion permission, however, the land pertaining to solar development under Farmers' Scheme will have deemed conversion. However, there was lot of confusion in issuance of executive direction/orders to implement the guidelines for deemed conversion which compelled many farmers to approach the revenue authorities for regular

land conversion route. This regular land conversion route involves hercules task which required several documents from several Departments to submit the application for conversion of the land. Most of the cases, the delay seems to be with regard to conversion of the land.

109. Apart from conversion of land, there seems to be delay in obtaining evacuation either provisional or final approval, so also in approving the drawings and intimating the estimation of the charges to be paid. Similarly, once application is submitted to CEIG to certify safety of the plant in order to start commissioning of the solar plant, in many cases time is taken to come and inspect the site. Even in this Appeal, we note that the drawings required for the bay terminal and other requirements for connectivity at the bay of the substation of the transmission/distribution system, the authorities took some time. All this could happen only in October 2016. Only after approval of the grid connectivity finally granted, the Appellant could approach the Chief Electrical Inspector with drawings pertaining to the electrical installation of the solar power plant.

110. Apparently, the scheme was meant to benefit small land holding farmers, who could establish solar plants between 1 MW to 3 MWs. This also definitely requires business prudence apart from minimum knowledge in the field concerned. As per the policy, the establishment of solar plant

was to be in the agricultural land. On account of restrictions to use agricultural land for non-agricultural purpose, conversion of agricultural land use is a must. In terms of Karnataka Revenue Act, it has laborious process to get conversion of agricultural land into non-agricultural one. To establish solar power plant, it is not just conversion of agricultural land permission, but several other approvals/consent/permissions were required.

111. Till SPV was established, it was the individual Appellant i.e., SPD who had to run from office to office to secure required approvals/consents. Having regard to laborious process to secure these permissions from various Government instrumentalities, it would have been a wise decision to have infrastructure under one roof (like single window agency) to get all these clearances which would have saved lot of time for the establishment of these small solar power plants in question. Since either the SPD or SPV had to run from office to office situated at different places to secure approval and permission which would not have been possible to secure on any one particular day also seems to have caused hardship and delay in procuring the approvals, be it land conversion or power evacuation and grid connectivity or safety certificate from CEIG etc. To apply for conversion of land to non-agriculture purpose itself, more than 13

documents are required, which have to be secured not from single place but various departments of Government. The scheme which was expected to be a boon to the farmers seems to have become a bane.

112. Therefore, it is quite evident that there was no fault of the Appellant in approaching various Governmental Instrumentalities for necessary sanctions/approvals. Though all care and caution was duly exercised, considerable time was lapsed by the time the Appellant obtained the necessary approvals. Definitely, the fault does not lie with the Appellant. One cannot blame the Appellant, since the delay has occurred from the Govt. Instrumentalities in issuing necessary approvals and sanctions.

113. Having known the consequences of not commissioning the solar plant within SCOD, after investing crores of rupees in setting up the solar plant, it is not possible for the Developer to keep quiet or be negligent in complying with the conditions in the PPA. For no fault of the Developer, if delay occurred on account of reasons beyond the control of the Appellant, the Appellant cannot be punished.

114. We are of the opinion that the Farmers' Scheme which was advanced for creating opportunities for farmers should not become a curse to the farmers. The Appellant was running from office to office to secure the required approvals and sanctions. The project was commissioned

somewhere in the month of May i.e., on 08.05.2017 when the proceedings in the Petition was pending before the State Commission. The HESCOM in terms of requirement of PPA issued commissioning certificate and the power started flowing in to the Grid from 08.05.2017. The original SCOD in terms of PPA was 18 months' from effective date. As stated above, PPA becomes effective only on the date of the approval of the PPA. As already state above, by virtue of extension of time by the HESCOM to commission the solar plant, the SCOD automatically gets postponed i.e., 30.08.2017. But the Appellant commissioned the solar plant much prior to the extended SCOD.

115. It is relevant to point out the conduct of the HESCOM. During the entire process of securing these approvals by the Appellant, the Solar Developer has brought to the notice of the HESCOM the obstacles faced and pertinently at no point of time, there was any note of caution or objection finding fault with the pace at which the Solar Developer was pursuing the execution of the solar plant. In fact, after accepting the reasons for the delay being force majeure event in terms of PPA, the HESCOM did extend time for commissioning of the plant by six months. Subsequently, the conduct of the HESCOM is bit surprising. It started finding fault with the Appellant contesting the matter seriously questioning

the reasons for delay as force majeure event. We are of the opinion that the Respondent HESCOM cannot approbate and reprobate.

116. According to us, the terms of PPA, especially Clause 8.3 also comes to the aid of the Appellant, since the delay caused was on force majeure event on account of laches on the part of various Governmental Instrumentalities. If the Appellant was not responsible for the said delay, we are of the opinion that the same cannot affect the implementation of the solar plant which can ruin the Developer financially.

117. In terms of the Articles and various Clauses especially Clause 6.4 of the PPA, if the amounts are due, not paid in time, the Solar Developer is entitled for late payment surcharge. Since the delay was not on account of the Appellants and they did commission the solar plant within the extended SCOD, we are of the opinion that they are entitled for late payment surcharge. Similarly, since there was no deficit on the part of the Appellants in any manner, they are not liable to pay Liquidated Damages or any other damages.

118. In light of the above discussion and reasoning, we are of the opinion that the Respondent Commission failed to analyze all the facts and circumstances in issue judiciously. Hence, the impugned order warrants interference. Accordingly, we pass the following Order:

ORDER

- (a) **The Appeal is allowed and the impugned order is set aside.**
- (b) **The Appellant is entitled for Rs.8.40 per unit in terms of PPA.**
- (c) **The 1st Respondent - HESCOM to pay the difference of the tariff paid per unit from the date of commission of the plant along with late payment surcharge in terms of PPA within one month from today.**
- (d) **The Appellants are not liable to pay any damages and so also liquidated damages.**

119. Pending IAs if any, shall stand disposed of. No order as to costs

Pronounced in the Virtual Court through video conferencing on this
the **12th day of August, 2021.**

(Ravindra Kumar Verma)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / NON-REPORTABLE

tpd/ts